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JOHN F. DAVIS,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 964

LAS VEGAS LOCAL JOINT EXECUTIVE BOARD of CULINARY WORKERS AND BARTENDERS; CULINARY WORKERS UNION, Local No. 226; and BARTENDERS UNION, Local No. 165;

Petitioners,

vs.

LAS VEGAS HACIENDA, INC. and CASINO OPERATIONS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above cause September 27, 1967.

OPINIONS BELOW

The opinion of Merrill, Circuit Judge, concurred in by Circuit Judge Barnes and District Judge Von Der Heydt, for the United States Court of Appeals for the Ninth Circuit, rendered September 27, 1967 (Appendix A, p. 1) is reported in 383 F. 2d 667.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1967 (Appendix C, p. v). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Where an employer and a labor union are parties to a written collective bargaining agreement and have agreed that any business operations which are owned by, operated by or substantially under the control of the employer shall be subject to the terms of such collective bargaining agreement and that any disputes between them shall be submitted to arbitration, does a federal court, in acting upon a petition to compel arbitration under said agreement, have authority to decide the question of whether particular business operations are or are not owned by, operated by, or subtantially under the control of the employer, thereby deciding the issue sought to be arbitrated?

2. Is a labor union representing employees in an industry affecting commerce entitled to an order from

a federal court enforcing a collective bargaining agreement providing for arbitration of disputes thereunder against an employer who is a signatory to such an agreement and also against certain business operations which are or may be owned by, operated by, or substantially under the control of the signatory employer, notwithstanding a separate corporate identity, where the collective bargaining agreement provides that the terms thereof shall apply to business operations having such a relationship to the signatory employer?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (herein the "Act"), are printed in Appendix B hereto, p. iv. The official citation to these statutory provisions is 61 Stat. 136 (1947).

STATEMENT

One of the Respondents herein, Las Vegas Hacienda, Inc., and the Petitioners have since 1964 been signatories to a written collective bargaining agreement which contains the following terms:

> "This agreement shall cover all operations within the jurisdiction of the Union, which are now or which may during the term hereof (or any extension thereof) be owned by, operated by or substantially under the control of the Employer; the term 'Employer' shall be deemed to include any person, firm, partnership, corporation, joint

venture or other legal entity substantially in control of, substantially controlled by, or substantially under the control of an employer covered by this Agreement." (R. p. 8, Section 30.)

The collective bargaining agreement also contains a comprehensive arbitration procedure for the resolution of all disputes arising thereunder *(including disputes concerning the application and interpretation of the terms set forth above):*

"Any complaints of alleged violations and grievances under this Agreement will first be handled with the individual Employer. In the event the Business Representative of the Union and the Employer are unable to adjust said grievance or misunderstanding within forty-eight (48) hours, said grievance shall be referred to the Board of Adjustment as hereinafter outlined.

(a) The Board of Adjustment shall be composed of two (2) members appointed by the Union and two (2) members appointed by the Employer. In general, the duties of the Board shall be: To establish the general recognition and enforcement of wages; *to adjudicate disputes or differences that may arise in the enforcement or interpretation of this Agreement;* and to promote the mutual interest of the parties to this Agreement and the Restaurant Industry of Southern Nevada.

(b) The Board of Adjustment shall meet within forty-eight (48) hours after written notice by either party, and final decision must be rendered within ten (10) days after the complaint is made.

(c) The parties agree that there shall be no cessation or stoppages of work in the event of any

dispute affecting this Agreement. *It is understood and agreed that any controversy that may arise over the provisions of this Agreement shall be referred to the Board of Adjustment as outlined above for arbitration.* Should the Board of Adjustment fail to agree they shall select a disinterested party to serve with them as a Board of Arbitration, said Board to, within seven (7) days, render a decision that shall be final, binding and conclusive upon all parties concerned.

(d) The members of the Board of Adjustment representing the employees and Employer, if compensated, shall be paid by respective principals, and other expenses incurred as a result of arbitration shall be borne one-half (½) by the Union and one-half (½) by the Employer, upon authorization by the Board of Adjustment." (R. p. 8, Section 19; emphasis supplied.)

Respondent Casino Operations, Inc. operates the casino on the premises of Respondent Las Vegas Hacienda, Inc. Neither of the Respondents would agree with Petitioners that the collective bargaining agreement applied to the casino operations. Believing that Casino Operations, Inc. was and is owned by, operated by, or substantially under the control of Las Vegas Hacienda, Inc. the Petitioners lodged a grievance under the collective bargaining agreement concerning the failure and refusal of the Respondents to apply the collective bargaining agreement's terms to the casino operations and sought to invoke the arbitration procedure in an attempt to resolve the issue. Petitioners specifically charged that the contract terms above set forth were within the ambit of the arbitra-

tion procedures and, if their grievance had merit, required that Respondents adhere to the contract terms with respect to the operation of the casino.

When Respondents, and each of them, refused to proceed to arbitration, Petitioners instituted suit in the United States District Court for the District of Nevada for the purpose of compelling Respondents to submit to arbitration pursuant to the collective bargaining agreement.

The District Court held that Petitioners failed to establish a binding contract with either of the Respondents, including Las Vegas Hacienda, Inc., *admittedly a signatory to the agreement,* which would require arbitration of the dispute in question. The court denied the petition to compel arbitration, basing its denial upon its finding of fact that Casino Operations, Inc. was *not* owned by, operated by, or substantially under the control of Respondent Las Vegas Hacienda, Inc. *within the meaning of the parties' collective bargaining agreement,* and that, consequently, the employees involved were not employed by Las Vegas Hacienda, Inc. The lower court thereupon concluded that since the employees were not employees of the signatory party to the collective bargaining agreement, the undisputed obligation of Las Vegas Hacienda, Inc. to submit its differences with Petitioners to arbitration became "moot."

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that the District Court had authority to re-

solve the contract question which Petitioners sought to have submitted to arbitration pursuant to the comprehensive arbitration procedure contained in the collective bargaining agreement between Respondent Las Vegas Hacienda, Inc. and Petitioners. The court below, misconstruing and misapplying certain decisions of this Court and other courts, determined that since the dispute between the Petitioners and the Respondents concerned the *applicability* of the contract to the employees employed in the casino operated by Casino Operations, Inc., it was a matter properly for the courts and not the arbitrator to resolve.

Petitioners, in the court below, asserted that the District Court had usurped the functions of the arbitrator by passing on the merits of the precise contractual issue sought to be submitted to arbitration, to wit, the interpretation and application of the language of the agreement purporting to bind all business operations which Las Vegas Hacienda, Inc. owned, operated or substantially controlled, whether or not, as stated in the collective bargaining agreement, the business operations may have been a legal entity separate, in legal contemplation, from Las Vegas Hacienda, Inc.

Petitioners also asserted to the court below that Las Vegas Hacienda, Inc. had agreed with Petitioners by its collective bargaining agreement to submit this dispute to arbitration for its resolution, rather than to the court, thus ousting the court of jurisdiction and authority to consider the issue on its merits.

REASONS FOR ALLOWANCE OF WRIT

THE DECISION OF THE COURT BELOW IS IN ERROR AND IS IN DIRECT CONFLICT WITH ITS OWN DECISIONS AND WITH THE DECISIONS OF THE SUPREME COURT AND THE COURTS OF APPEALS OF OTHER CIRCUITS.

Respondent Las Vegas Hacienda, Inc. and Petitioners have expressly agreed in writing: (1) that business operations owned by, operated by, or substantially under the control of Las Vegas Hacienda, Inc. shall be covered and bound by their written collective bargaining agreement; (2) that the term "Employer," as utilized in their collective bargaining agreement shall be deemed to include all forms of legal entities in fact conducting business operations owned by, operated by, or substantially under the control of Las Vegas Hacienda, Inc.; and (3) that any differences or disputes between Las Vegas Hacienda, Inc. and Petitioners regarding these understandings and agreements shall be submitted to arbitration for final resolution.

In deciding that the Nevada District Court acted with propriety in undertaking to determine for itself whether Casino Operations, Inc. was owned by, operated by, or substantially under the control of Las Vegas Hacienda, Inc., rather than permitting the question to be submitted to arbitration as the parties to the collective bargaining agreement had agreed and as Petitioners sought to accomplish by their petition to compel arbitration, the lower court has come into direct and irreconcilable conflict with the decisions of the Supreme Court and the Courts of Appeals of other Circuits.

The Supreme Court has settled the question of whether parties to written collective bargaining agreements may reserve to themselves the right to submit their differences and disputes to arbitration rather than to the courts. It is well-established that arbitration provisions in written agreements will be given full play in the labor-management context, that only those matters which the parties to a written agreement have expressly agreed to exclude from the arbitration procedure shall be so excluded, and that all doubts as to the applicability of the arbitration agreement to any particular dispute are to be resolved by the courts in favor of arbitration. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564; *United Steelworkers v. Enterprise Corp.,* 363 U.S. 593; *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574; *Wiley & Sons v. Livingston,* 376 U.S. 543. Moreover, the parties to a written collective bargaining agreement may reserve the question of arbitrability of the dispute for resolution by an arbitrator rather than by the courts. *Steelworkers v. Warrior & Gulf Nav. Co., supra; Machinists, Lodge 12 v. Cameron Iron Works* (C.A. 5, 1961), 292 F. 2d 112, Cert. den. 368 U.S. 926.

In affirming the undertaking of the United States Distict Court of the District of Nevada in deciding the precise question sought to be submitted to arbitration by the Petitioners under express contractual language, the court below passed upon the *substantive merits* of the Petitioners' contract dispute. It has done so under the guise of purporting to decide whether or

not an agreement to arbitrate "existed." In taking this approach to the issue raised by Petitioners' action to compel arbitration in the District Court, the United States Court of Appeals for the Ninth Circuit has unduly restricted the scope of the arbitration process and has effectively excluded from an all-encompassing arbitration agreement a subject which the parties to the collective bargaining agreement have expressly agreed would be within the ambit of the arbitration procedure. This action is directly inconsistent with the decisions of the Supreme Court in *United Steelworkers v. American Mfg. Co., supra; United Steelworkers v. Enterprise Corp., supra; United Steelworkers v. Warrior & Gulf Nav. Co., supra.*

The decision of the court below is also in direct conflict with the decisions of the Courts of Appeals of other circuits, as well as with its own decisions with respect to the arbitrability of disputes under collective bargaining agreements. *Wright Steel & Wire Co. v. United Steelworkers* (C.A. 1, 1965), 346 F. 2d 928; *Communications Workers v. Bell Telephone Laboratories* (C.A. 3, 1965), 345 F. 2d 398; *Local 24, I.B.E.W. v. Heart Corp.* (C.A. 4, 1965), 352 F. 2d 957; *Scalzitti Co. v. Int'l Union of Operating Engineers* (C.A. 7, 1965), 351 F. 2d 576; *Los Angeles Paper Bag. Co. v. Printing Specialties and Paper Products Union* (C.A. 9, 1965), 355 F. 2d 757; *Desert Coca-Cola Bottling Co. v. General Sales Drivers, etc.* (C.A. 9, 1964), 335 F. 2d 198.

THE LOWER COURT'S DECISION REVERTS TO THE SO-CALLED CUTLER-HAMMER DOCTRINE EXPLICITLY REJECTED BY THE SUPREME COURT IN UNITED STEELWORKERS v. AMERICAN MFG. CO., 363 U.S. 564 AND THEREFORE PRESENTS ISSUES OF GRAVE IMPORTANCE TO PARTIES TO AGREEMENTS WHICH GIVE BROAD SCOPE TO ARBITRATION AS THE MEANS OF RESOLVING THEIR DISPUTES. THE VITALITY OF THE ARBITRATION PROCESS UNDER THE NATIONAL LABOR POLICY IS THREATENED BY THE RESTRICTIONS PLACED UPON PARTIES TO ARBITRATION AGREEMENTS BY THE DECISION OF THE LOWER COURT.

In passing upon the substantive merits of the precise issue which the Petitioners sought to have submitted to arbitration, namely, the interpretation and application of the written provisions of the collective bargaining agreement binding any operations owned by, operated by, or substantially under the control of the signatory employer, Respondent Las Vegas Hacienda, Inc., the lower court has, in effect, embraced the rejected doctrine perhaps best enunciated in *Int'l Assn. of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317, aff'd 297 N.Y. 519, 74 N.E. 2d 464, wherein the courts themselves undertook to decide the merits of grievances and disputes sought to be submitted to arbitration.

Recognizing the efficacy of the arbitration process and its therapeutic effects upon the day-to-day relationships of employers, their employees, and their employees' unions, the Supreme Court unequivocally repudiated the "Cutler-Hammer" approach to collective bargaining agreement disputes. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564.

The decision of the lower court, clearly, and on its face, shows that the merits of the precise issue which the Petitioners desire to submit to arbitration, as agreed to by the parties in their collective bargaining agreement, has been decided by the lower court. Thus, although the parties have in effect agreed to oust the courts of authority and jurisdiction to resolve their contractual disputes, nevertheless the lower court has seen fit to itself decide the dispute. Clearly, the agreement to arbitrate has been effectively eviscerated from the parties' written agreement.

Extremely serious questions are raised by the action of the lower court since its decision creates substantial doubt as to the scope of the arbitration process and the extent of the right and privilege of parties to collective bargaining agreements to make agreements to submit their disputes to arbitration and their right to remove such disputes from the jurisdiction of the courts. The vitality afforded to the arbitration process by the decisions of the Supreme Court in 1960 in the *Steelworkers* cases is, we believe, seriously threatened since if this decision is allowed to stand confusion is once again created as to the proper role of the courts under the national labor policy encouraging arbitration and the making of agreements to arbitrate.

Since the decision of the lower court, unless corrected will have serious repercussions on the arbitration mechanism in thousands of written contracts across the country, it is respectfully submitted that review of this case is essential in the interests of established national labor policy and settled law.

CONCLUSION

For the foregoing reason this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California,
December 19, 1967.

Respectfully submitted,
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(Appendices A, B and C Follow)